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Comment 44. Part 9553.0075, subpart 1. Ms. Sajevic offered an amendment to permit interim rates for facilities which voluntarily decertified a substantial number of beds. The Department recognizes that it is necessary to address the bed reduction issue and to encourage providers operating large facilities to voluntarily decertify all or some of their beds. The Department is in the process of developing an allocation of the 1000 waivered services slots approved by the legislature. Many of these service slots must be alloted to meet the Welsch vs. Levine Consent Decree which requires a large reduction in the population of persons with mental retardation residing in state hospitals. The Department plans to use some of those waiver service slots for bed reduction projects in community ICF/MR facilities. Bed reduction projects will generally include a conversion from Class A to Class B beds. Bed reduction projects also will require a special allocation of waivered service slots. Since bed reduction projects are tied to allocation of waivered service slots it would be unreasonable for this rule to create another process for bed reduction involving the interim/settle-up payment rate provisions of the proposed rule which is independent of the waiver service allocation system. The Department believes that any bed reduction project approved by the commissioner can receive a rate adjustment through this proposed rule under Part 9553.0075 because of the Class A to Class B conversion. Therefore, the Department wishes to retain the proposed rule as published.

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Comment 45. Part 9553.0080, [general]. Ms. Martin expresses a number of concerns about appeal procedures established in the proposed rule. First, she wants a requirement that an appeal should be referred to the Office of Administrative hearings within 30 or 90 days of receipt if it is not resolved informally. The Department believes that such a requirement is impractical and unreasonable because it does not take into account that most negotiated settlements require more time to resolve or that some issues have a higher priority than others in terms of allocating available resources. Ms. Martin has overlooked the point that neither the Minnesota Legislature nor federal regulations have imposed mandatory deadlines for resolving rate appeals. A recent case, Heckler v. Day, 104 S. Ct. 2249, 2254 (1984), addressed this issue with respect to disability claims:

> The Secretary correctly points out that Congress repeatedly has been made aware of the long delays associated with resolution of disputed disability claims and repeatedly has considered and expresaly rejected suggestions that mandatory deadlines be imposed to cure that problem. She argues that Congress expressly has balanced the need for timely disability determinations against the need to ensure quality decisions in the face of escalating workloads and limited agency resources. In striking that balance, the Secretary argues, the relevant legislative history also shows that Congress, to date, has determined that mandatory deadlines for agency adjudication of disputed disability claims are primary objectives, and that the district court's statewide injunction flatly contradicts that legislative determination. We find this argument persuasive.

The same reasoning applies equally to the question of whether the proposed rule can reasonably omit such deadlines. The Department desires to retain the proposed language, as published.

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Comment 46. Part 9553.0080, subpart 1, item A. Ms. Martin believes the proposed rule inappropriately limits appeals to those that would change the provider's rates. The Department does not believe it ought to waste valuable resources litigating hypothetical issues. If an unappealable disallowance in a particular rate year affects the rate in a later year, it would seem obvious that the decision to carry forward the earlier treatment on a specific cost would fit the requirement that an appeal must relate to an application of the rule resulting in a change to a payment rate. The rule adequately protects the right of a provider to appeal decisions of the commissioner that may constitute an actual detriment to the provider, at the same time as it reasonably protects state resources. The Department desires to retain the proposed language, as published.

Comment 47. Part 9553.0080, subpart 2, item B, subitem (4). Ms. Martin disagreed with the appropriateness of a requirement that a provider state the authority upon which it relies in its challenge to rate setting. The Department has proposed this requirement as one of several requirements that result in clear and specific statements of appeal issues as a means to instituting procedures to expedite the appeal process.

These requirements will enable the Department to identify issues and, in many instances, offer immediate relief to providers. It would be impossible to deal with providers in such an expeditious manner if it was necessary to initiate individual contacts just to find out what the problem is. In light of the backlog of appeals that presently exists and Ms. Martin's concerns that appeals be resolved in a timely fashion, the Department is surprised that she finds this provision objectionable.

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Ms. Martin went on to say that she believed this requirement violates the attorney-client privilege, but she does not explain how it would do so. The authority upon which an appeal relies is not a confidential communication nor work product. The rules of civil procedure require a statement showing that the pleader is entitled to relief, and it is reasonable to require a provider to explain the basis of its claim before triggering administrative and/or contested case procedures. Moreover, the rules of discovery would permit the Department to discover this information. The Department desires to retain the proposed language, as published.

Comment 48. Part 9553.0080, subpart 5. Ms. Martin objected to the provision in the proposed rule that allows the state 120 days in which to pay underpayments upon the resolution of an appeal. She stated that the Department is subject to M.S. 16A.124e in its payments to Medical Assistance vendors. The Department would point out that the cited statute applies to "state contracts"; the relationship between the Department and a vendor is not a matter of contract, but is a complex matrix of federal and state statutes and regulations.

In addition, if the Department were to acknowledge that Medical Assistance reimbursement is governed by 16A.124, this would contravene the federal requirement that a single state agency administer the MA program. 42 U.S.C. 1396a(a) (5); 42 CFR 431.10. The provision cited by Martin requires the Commissioner of Finance to oversee the prompt payment. The Department has sole authority to administer the MA program and to make payments pursuant to that program. State law mandates the centralized disbursement of Medical Assistance payments by DHS under M.S. 256B.041. All these reasons support the

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Department's incorporation into Rule 53 of its own provision which governs the payment of overpayments and underpayments under the Medical Assistance program. The Department desires to retain the proposed language, as published.

Comment 49. Part 9553.0080, subpart 6. Ms. Martin expressed concern with the possibility that a provider which is subject to the administrative limit will not be able to recover the cost of successful litigation. The Department believes that such costs are properly classified as administrative costs and are subject to the same limitations as any other administrative cost pursuant to the statutory requirement that administrative costs be limited. The decision to pursue an appeal is subject to the same cost/benefit analysis that would apply to any other business decision. A provider would also have the ability to reduce variable administrative costs in order to ensure that litigation costs were reimbursed. Therefore, the Department desires to retain the proposed language, as published.

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Comment 50. Barbara Kaufman, Executive Director of the Minnesota Association of Voluntary Social Service Agencies, in her letter of August 28, 1985 commented on many rule parts. In the cover letter she indicated the need for the proposed rule to be responsive toward persons with increased levels of disability moving into community ICF/MR's and the need for the proposed rule to make it possible to create more Class B beds. The Department believes it has responded appropriately to these needs. (See Part 9553.0050, Subpart 3 and Part 9553.0075 and also Comments 34 and 37.)

Ms. Kaufman asserts that a facility which arranges for weekend visits home as a part of an individual's program plan will not be reimbursed for care during that period if its occupancy is under 96%. This statement is incorrect. The occupancy percentage remains at 93% for purposes of reimbursing leave days. Also, all facilities of 24 or fewer certified beds are not required to meet the 93% test. Further, the number of therapeutic leave days for ICF/MR facilities is unlimited provided there are no vacant certified beds for the entire month. Reserved beds count as occupied beds. This information can be obtained from a Departmental Bulletin (Exhibit EE).

In addition to the letter dated August 28, 1985, the seven page attachment lists several additional comments by proposed rule part. The Department's response to these comments will be listed in the same order as in the attachment. Where no comment is made the Department relies on its statement of need and reasonableness and its affirmative presentation made at the August 21 - 23, 1985 Public Hearing.

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Part 9553.0030, Subpart 1, item C (See Comment 18).

Part 9553.0030, Subpart 4, items A - E (See SNR and Comments 7,8,9, and 10)

Part 9553.0030, Subpart 6 (See Comment 11)

Part 9553.0035, Subpart 5, item A. subitem (4). The Department does not agree that the phrase "all other documents necessary" is unreasonable. The phrase is a general statement and is necessary to cover documents other than those listed which can explain the facility's financial and statistical records. The Department desires to retain the language as published.

Part 9553.0035, Subpart 5, items B and C (See Comment 12)

Part 9553.0035, Subpart 6, item B, subitem (2) and item D (See Comment 13)

Part 9553.0035, Subpart 14 (See Comment 18)

Part 9553.0035, Subpart 15, item E (See Comment 19)

Part 9553.0035, items Q and R (See Comment 20)

Part 9553.0036, item EE (See Comment 18)

Part 9553.0040, Subpart 3 (See Comment 22 and 34)

Part 9553.0041, Subpart 1 (See Comment 23)

Part 9553.0041, Subpart 3, item E (See Comment 26)

Part 9553.0050, Subpart 1, item A, subitem (1) (See Comment 34)

Part 9553.0050, Subpart 1, item A, subitem (3) (See Comments 34 and 35)

Part 9553.0050, Subpart 3, item A (See Comment 37)

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Part 9553.0060, Subpart 1. Ms. Kaufman raises the concern that the proposed rule changes the depreciation for physical plants from 35 years to 20 years. The proposed rule has the same useful lives for facility assets as the prior reimbursement rules. If the useful life is changed from 35 years to 20 years, it would be done based on an audit adjustment in which the facility's records or facts do not correspond to the useful life assigned by the provider. The Department desires to retain the proposed provision as published.

Part 9553.0060, Subpart 1, item C (See comment 38)

Part 9553.0060, Subpart 5, item C. Ms. Kaufman raised the concern that because some portion of capital debt reduction allowance is used to reduce outstanding debt and thereby interest expense, providers will be encouraged to borrow even more money. The Department disagrees with that contention because as the amount of debt increases, even though the payment rate increases due to increased interest expense, the increased amount is paid, indirectly, to a bank. Also, as the debt is increased, the provider has less "unfunded" depreciation at his/her disposal and hence less flexibility. Conversely, when cash is used to purchase capital assets, equity is increased, increasing the "unfunded" depreciation and thereby the provider's flexibility. Since the proposed rule is a prospective reimbursement system, the capital debt reduction allowance applied to reduce debt will not result in reductions in reimbursement until the following reporting year. The result is that since the payment rate is based on historical cost, the reduction in interest expense will increase the cash flow for the facility. Again, this is yet another incentive to reduce debt.

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As debt is reduced and equity increased, a greater amount of the capital debt reduction allowance is made available to providers and is not required to be used for debt reduction. Therefore, the Department believes that the proposed rules have proper incentives for debt reduction and desires to retain the proposed provision as published.

Comment 51. Patricia Cullen, Public Affairs Director, Greenbrier Home, Inc., in her September 5th letter, expressed doubt that the Department will be able to administer the proposed rule in a timely manner. (See Comment 28).

In her second comment, Ms. Cullen suggests that the proposed rule "discourages providers from serving more difficult, high-needs individuals". The Department addressed this concern in Comment 37.

Comment 52. Mr. W. Scott Wallace, Certified Public Accountant, raised several concerns in his letter dated August 27, 1985. The Department's responses are as follows:

Part 9553.0041, Subpart 1 (See Comments 23,28, and 34)

Part 9553.0041, Subpart 3, item A. Mr. Wallace suggested that the requirement on small providers who must file "unaudited" financial statements be reduced because the results are "additional unnecessary and unreasonable costs." The Department believes that this provision applies to a related organization which includes costs in the facility's cost report in excess of $1000 annually. The Department does feel that the provision is unclear in that the terms "related organization" and "provider group" are in conflict and therefore proposes the following amendment:

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Page 33, line 3, strike "in the provider group" , line 6 strike "for an entity in the provider group".

The provision of the proposed rule which addresses Mr. Wallace's concern is Subpart 2, item C of this Part. Subpart 2, item C requires a "balance sheet and income statement for each facility prepared in accordance with generally accepted accounting principles unless audited financial statements are required to be submitted according to Subpart 1. ". That item goes on to describe what "audited" financial statements include. Therefore, the Department believes that Mr. Wallace's concern is addressed by the rule as proposed. Since providers who are not required to have certified audited financial statements must file a balance sheet and income statements in accordance with GAAP.

Part 9553.0041, Subpart 3, item E (See Comment 26)

Part 9553.0041, Subpart 8, item A (See Comment 28 and 29)

Part 9553.0041, Subpart 11, item B (See Comment 12)

Part 9553.0041, Subpart 11, item C (See Comment 30)

Comment 53. Mr. Roger Moore, Executive Director, Forestview Community Homes, Inc. raised several concerns in his letter of August 30, 1985. Many of those concerns have been addressed by the Department in other comments. When appropriate those other comments are referenced.

Inability to respond to changing program needs

Mr. Moore claims that limiting the one-time adjustment to deficiencies is inappropriate. The Department, in Comment 37, has proposed an amendment which will allow the one-time adjustment in cases where there are deficiencies identified by the Department, the Department of Health, or the federal government (look behind audits) and also when a need is established through the biennial need redetermination process. We believe that the proposed rule

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